

**BEFORE THE MONTGOMERY COUNTY  
BOARD OF APPEALS**

**Office of Zoning and Administrative Hearings  
Stella B. Werner Council Office Building  
Rockville, Maryland 20850  
(240) 777-6660**

**IN THE MATTER OF:  
PETITION OF KENSINGTON NURSERY  
SCHOOL**

Petitioner

Helene Segal-Turner  
Jessie K. McGinley

For the Petitioner

\* \* \* \* \*

Martin Klauber,  
People's Counsel for Montgomery County

Neither in Support nor in  
Opposition to the Petition

\* \* \* \* \*

Art Gehringer

In Opposition to the Petition

\* \* \* \* \*

Before: Françoise M. Carrier, Hearing Examiner

Board of Appeals Case No. CBA-470-A  
(OZAH Referral No. 05-12)

**HEARING EXAMINER'S REPORT AND RECOMMENDATION**

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## I. STATEMENT OF THE CASE

Petition CBA-470-A, filed June 25, 2004, seeks to modify an existing special exception for a private educational institution, Kensington Nursery School (the “nursery school” or the “school”). The school is located at 3202 Decatur Avenue in Kensington, on property known as Lot 50 C and D, Block 3200, Kensington Heights Subdivision. The school seeks approval to a building addition that would house a multi-purpose room, to be used as a children’s play area during bad weather and a meeting room for school-wide events, as well as administrative space, storage areas and a handicapped-accessible restroom.

This case has a long procedural history, having lain dormant for a considerable period of time after the public hearing. Technical Staff of the Maryland-National Capital Park & Planning Commission (“M-NCPPC”) reviewed the modification petition and, in a report dated November 24, 2004, recommended *approval* with one condition. See Ex. 14. Staff also provided a supplemental staff report dated January 24, 2005, in response to questions raised by the Hearing Examiner. See Ex. 19. The Montgomery County Planning Board (“Planning Board”) reviewed this petition at its regular meeting on December 2, 2004, and voted 5 to 0 to recommend *approval* with the same condition recommended by Technical Staff.

On August 17, 2004, the Board of Appeals (“Board”) scheduled a public hearing in this matter for December 10, 2004, to be conducted by a hearing examiner in the Office of Zoning and Administrative Hearings. The hearing was later postponed to January 31, 2005 at Petitioner’s request. The hearing was convened as scheduled on January 31, 2005, after proper notice, at which time testimony and other evidence were received both in favor of and in opposition to the proposed modification. Evidence at the hearing raised a serious question about potential adverse impacts due to stormwater run-off, which had not been addressed directly by Petitioner, Technical Staff or the Planning Board. Petitioner was directed to consult with Technical Staff and the Department of Permitting Services (“DPS”) to prepare a concept stormwater management plan for submission into the record of this case, and the record was left open indefinitely for this purpose. The Hearing Examiner informed Technical Staff of this development by memorandum dated January 31, 2005. See Exs. 29-30.

No additional submissions were made until November 23, 2005, when the Office of Zoning and Administrative Hearings received a memorandum from DPS, stating that because the only construction proposed is an addition to an existing building, with less than 5,000 square feet of land disturbance, the building addition proposed in this case is exempt from compliance with the County's stormwater management regulations. See Ex. 31. On January 13, 2006, this office received a memorandum from Technical Staff providing an evaluation of stormwater management issues. See Ex. 33. This was followed by an email dated January 30, 2006, confirming that the conclusions in that memorandum do not change Staff's recommendation of approval, and an additional email dated February 9, 2006, providing Staff's favorable opinion regarding the revised site plan and lighting plan. See Exs. 35, 39. On February 28, 2006, Petitioner submitted into the record a stormwater management concept plan and supporting documentation. See Exs. 41 and 41(a) through (c). On April 6, 2006, the Hearing Examiner issued a notice of the new submissions and established a comment period. The record closed on April 21, 2006, no comments having been received.

Petitions to modify the terms or conditions of a special exception are authorized by §59-G-1.3(c) of the Zoning Ordinance. Section 59-G-1.3(c)(4) states:

The public hearing must be limited to consideration of the proposed modifications noted in the Board's notice of public hearing and to (1) discussion of those aspects of the special exception use that are directly related to those proposals, and (2) as limited by paragraph (a) below, the underlying special exception, if the modification proposes an expansion of the total floor area of all structures or buildings by more than 25%, or 7,500 square feet, whichever is less.

(A) After the close of the record of the proceedings, the Board must make a determination on the issues presented. The Board may reaffirm, amend, add to, delete or modify the existing terms of the special exception. The Board may require the underlying special exception to be brought into compliance with the general landscape, streetscape, pedestrian circulation, noise and screening requirements of 59-G-1.26, if (1) the proposed modification expands the total floor area of all structures or buildings by more than 25 percent, or 7,500 square feet, whichever is less, and (2) the expansion, when considered in combination with the underlying special exception, changes the nature or character of the special exception to an extent that substantial adverse effects on the surrounding neighborhood could reasonably be expected.

In the present case, the proposed modification would increase the floor area of the building by about 32 percent. Accordingly, this report and recommendation addresses the underlying



special exception, as well as the proposed modification. The Hearing Examiner agrees with Technical Staff that the proposed modification would not change the nature or character of the special exception sufficiently to create a reasonable expectation of substantial adverse effects. See Supplemental Staff Report, Ex. 19, at 2-3. Accordingly, the Hearing Examiner does not propose that the subject use be required to comply fully with the general landscape, streetscape, pedestrian circulation, noise and screening requirements of 59-G-1.26. This does not, however, affect the requirement for compliance with the general standards applicable to all special exceptions under §59-G-1.21, and the specific standards applicable to private educational institutions under § 59-G-2.19, including the screening requirement of § 59-G-2.19(a)(4)b.

## **II. BACKGROUND**

For the convenience of the reader, background information is grouped by subject matter.

### ***A. The Subject Property and Neighborhood***

The subject property consists of two recorded lots totaling 31,513 square feet. It is located at 3202 Decatur Avenue, on the south side of the street, in a one-block segment of Decatur Avenue between Kensington Heights Neighborhood Park and Pearson Street, just south of University Boulevard West and slightly north of Plyers Mill Road. The property has an irregular, four-sided shape, and slopes downward from front to back (north to south), with a ten-foot difference in elevation from the high point to the low point. See Ex. 22. It is developed with a one-story, cinder-block building that has housed the Petitioner, Kensington Nursery School, since 1957. The site also has a small, paved parking area on the west side of the building, a gravel parking area along the street frontage, and various play equipment in the back yard. Landscaping consists of shrubs and flowers around the building, as well as grass, deciduous shrubs and scattered trees

The photographs below depict the front, side and rear of the existing building. Houses in the background in photograph number 6 are on the north side of Decatur Avenue.

**Front of Building, Ex. 23, photo 1**



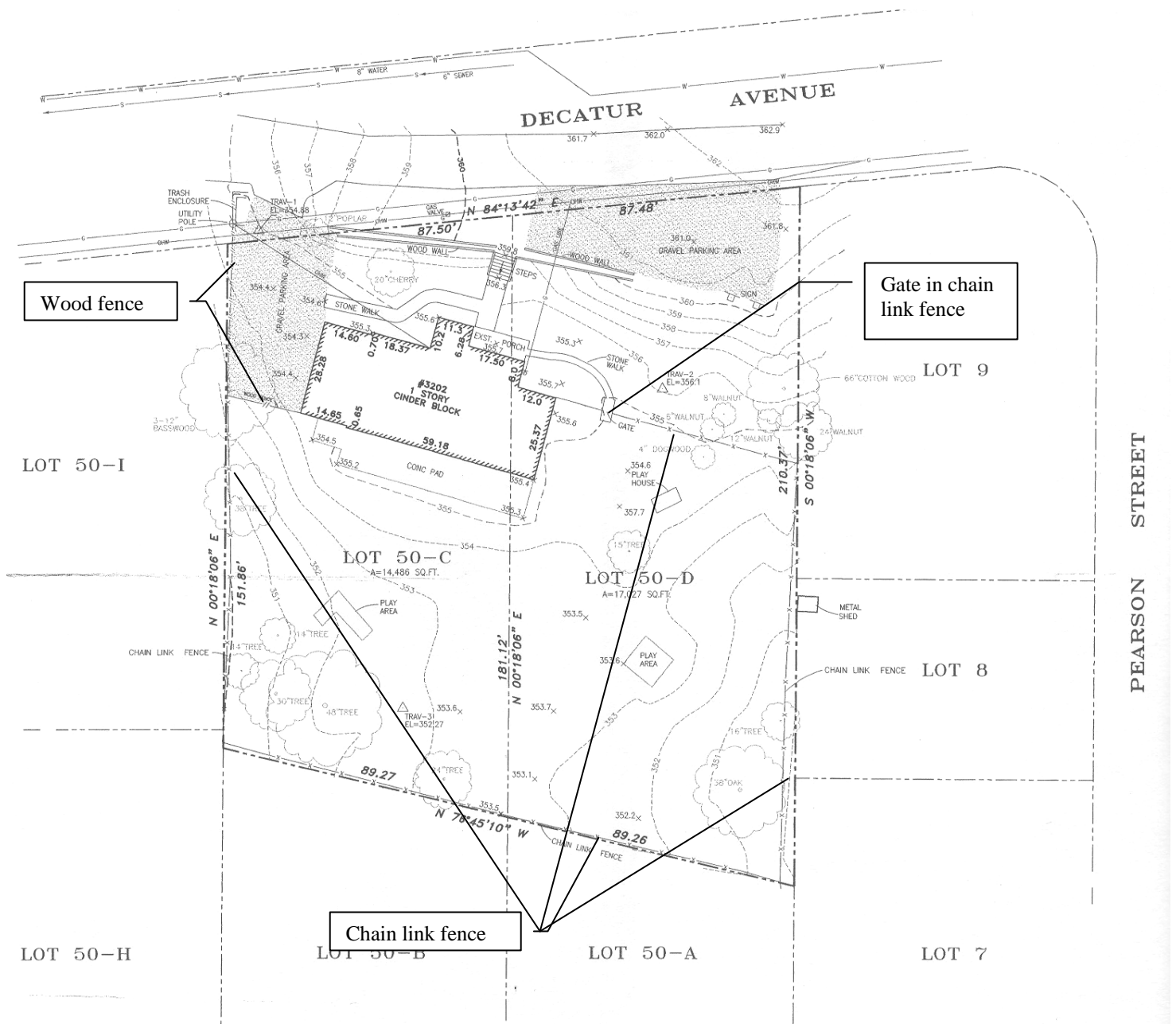
**East Side of Building, Ex. 23, photo 4**



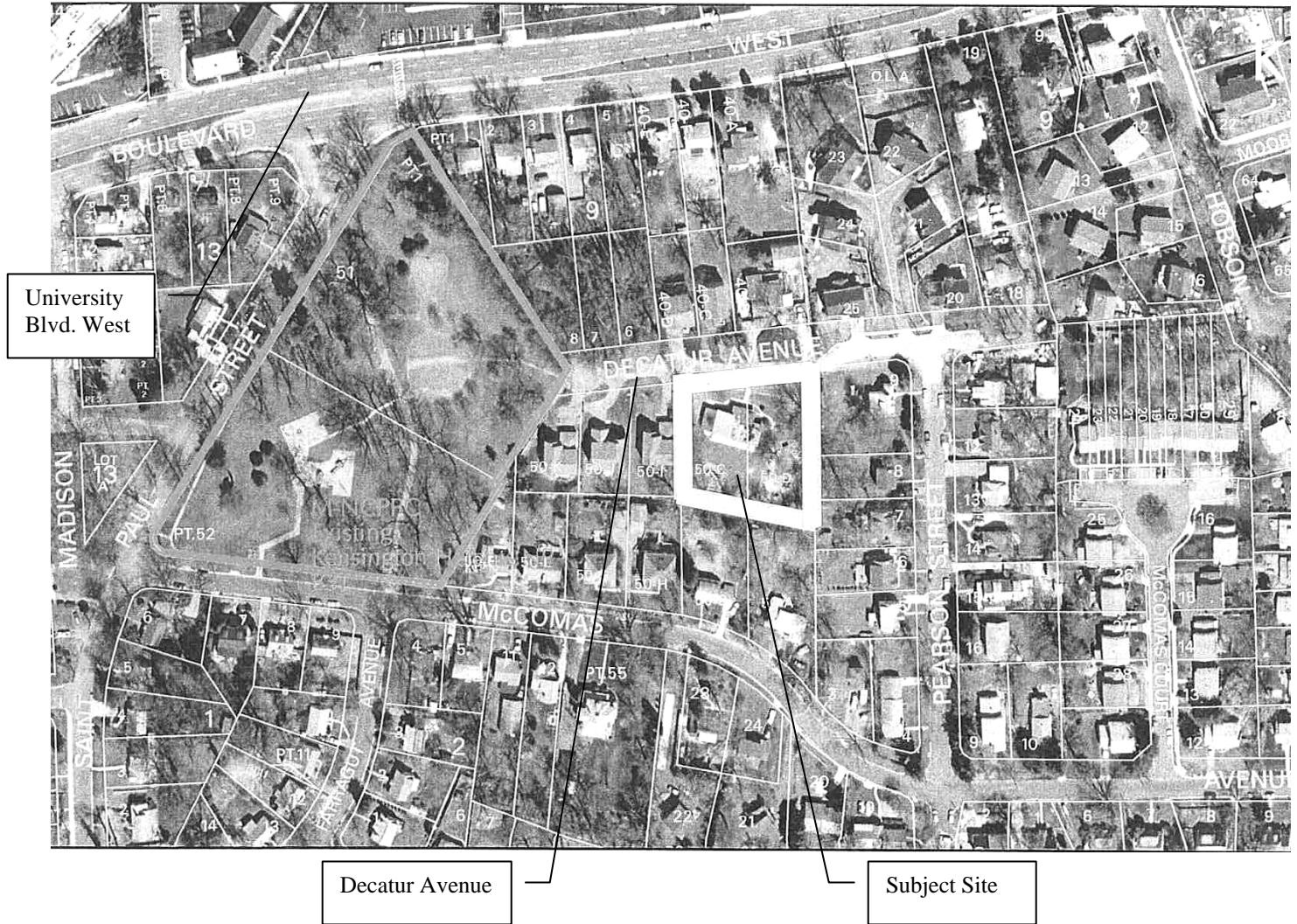
**Rear of Building, Ex. 23, photo 6**

The property is enclosed by a chain-link fence (i) along the entire rear property line; (ii) along the western property line from the rear property line to a point roughly even with the southwest corner of the building; and (iii) on the eastern property line from the rear property line to a point roughly even with the northeast corner of the building, where the chain link fence makes a 90-degree turn to the west and stops at the building wall. A gate in this part of the fence provides access from the front yard to the rear yard. Where the chain link fence ends on the western property line, a four-foot wooden fence runs perpendicular to the chain link fence, from the side lot line to the corner of the building. In addition, a six-foot wooden fence runs along the rest of the western property line, from the chain link fence to the street. These features may be seen on the Topographic Survey, Ex. 41(d), reproduced below.

## Topographic Survey (Existing Conditions), Ex. 41(d)



As shown on the aerial photograph on the next page, the subject property is surrounded on all sides by single-family residences. The segment of Decatur Avenue on which the site is located is not a through street; it is accessed via McComas Avenue (which connects to St. Paul Street and Hobson Street, both of which intersect University Boulevard West) and Pearson Street. In addition to the nursery school, eight homes front on this segment of Decatur Avenue, and four more share a common driveway that is reached from Pearson Street at its intersection with Decatur Avenue.

**Aerial Photograph, Excerpted from Staff Report, Ex. 14**

Technical Staff suggests that the general neighborhood of the subject property is bounded roughly by University Boulevard on the north, St. Paul street on the west, Glenway Drive and Drumm Avenue on the south, and Hobson Street on the east. As shown on the map below, this general neighborhood includes “those parts of the community whose residents might be expected to use Mccomas Avenue between Hobson and St. Paul streets to reach destinations in the Town of Kensington or to reach University Boulevard.” Supplemental Staff Report, Ex. 19 at 2. It includes the intersection of Mccomas Avenue and Pearson Street, which provides the sole access point to the portion of Decatur Avenue on which the school is located. The neighborhood is dominated by single-



family homes. West of the school, at the end of this segment of Decatur Avenue, is Kensington Heights Neighborhood Park, a four-acre park with basketball courts, a playground and an exercise course.

**Neighborhood Map, Excerpted from Supplemental Staff Report, Ex. 19**



### ***B. Land Use History***

The Board of Appeals granted a special exception on October 8, 1956, pursuant to Section 176-28k(1)(c)(4) of the Zoning Ordinance (Chap. 107, Mont. Co. Code 1955, as amended), to permit the construction of the existing building on the subject site for use as a parent-cooperative nursery school. The school was limited to 40 students on site at one time. See notice of Board action dated October 8, 1956, in original case file. Technical Staff reports that the cited section, Section 176-28(k), covered private educational institutions. Accordingly, the proposed modification is analyzed in this report under the conditions stipulated in Section 59-G-2.19 for private educational institutions.

The evidence indicates that the subject property has been used continuously as a nursery school for nearly 50 years. There is no record of any earlier modification of the special exception, although testimony indicated that at least one physical improvement has been made during the intervening period (paving a small, grassy area west of the building for use as a parking area). The Hearing Examiner explained to Petitioner's representatives that any permanent change to the site must have prior approval from the Board of Appeals.

### ***C. Master Plan***

The subject property is in the area covered by the *1990 Master Plan for the Communities of Kensington-Wheaton* (the "Master Plan"). The Master Plan evaluated the area between Decatur and McComas Avenues, but did not recommend changes to the existing zoning or land uses. The Master Plan includes the Kensington Nursery School on a map of group child day care facilities, although Petitioner's representatives at the hearing emphasized that their facility is a school, not a child day care facility. Technical Staff concludes that the proposed modification is consistent with recommendations in the Master Plan to create additional child day care facilities. Staff Report at 2, 6.

#### ***D. Proposed Modification***

The present modification petition seeks approval for an addition to the existing building, which would increase the total square footage from approximately 2,250 square feet to approximately 3,330 square feet, an increase of about 32 percent. The principal purpose of the addition is to create a multi-purpose room, which would serve as an indoor play room for the children during inclement weather, and would provide a convenient space for parent meetings. Testimony suggested that the impetus for the proposed project was the sniper crisis in the Fall of 2003, during which the children could not play outside for several weeks. The addition would also provide administrative space, additional storage space, and a handicapped-accessible adult bathroom. Petitioner does not propose to use the multi-purpose room as a classroom, nor does the school propose an increase in enrollment. In fact, Petitioner's representatives at the hearing agreed to a condition of approval that would reduce the number of children permitted on site at one time from 40 to 29, consistent with the school's current operations. Neighbor Art Gehringer raised a concern that the cost of the proposed addition could drive the school to request an increase in enrollment. In response, Petitioner's representatives agreed to a condition that would prohibit the school from seeking to increase enrollment, if this modification is approved, for a period of five years after that approval. Both witnesses expressed a reluctance to commit the school to not seeking an enrollment increase for a period longer than five years, because neither witness expects to be associated with the school in five years' time. The neighbor who raised this concern pointed out that the requested addition would be permanent, so Petitioner should be willing to make permanent concessions to get it.

Another neighbor, Amy Connor, raised a concern that construction of a multi-purpose room would lead to large meetings being held more frequently. With children from 65 families attending the school, meetings to which all parents are invited lead to many vehicles parking on this small street for extended periods of time. Ms. Connor reports that during these meetings, parents inevitably have to be requested to move their cars so residents can exit their driveways. To allay this concern,

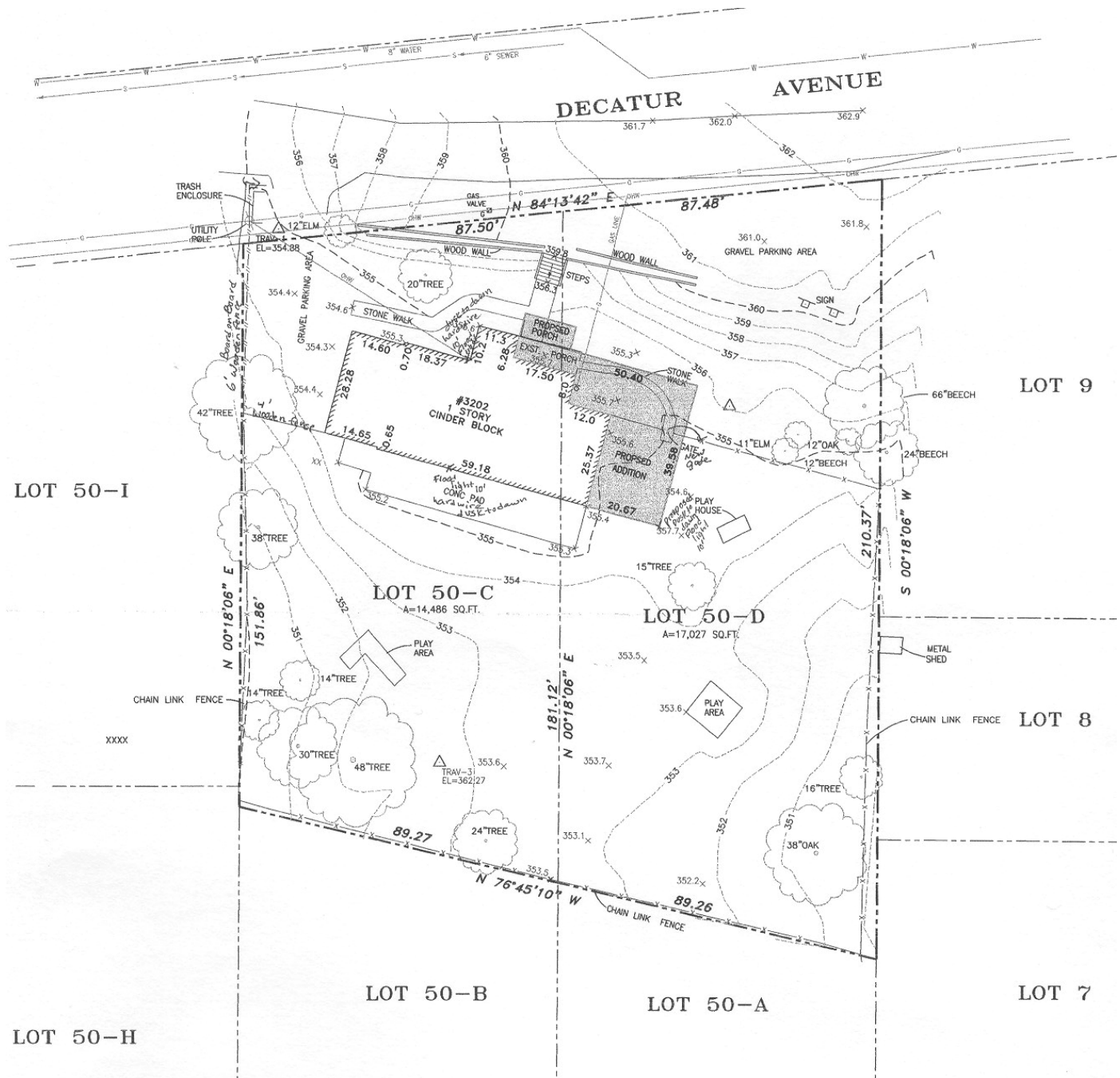


Petitioner's representatives agreed to a condition that would limit meetings to which all parents are invited to no more than two per year, which is consistent with the current practice. Petitioner's representatives were less specific about other meetings, but a written submission from the school indicates that in addition to the twice-yearly, mandatory parents meetings, each class has "a small, separate, 'back-to-school night,' and a board meeting convenes one evening each month. These usually have about 10-12 participants." Ex. 27. Petitioner's submission further states that the school has two to three "work days" each year for maintenance, and sometimes has a social event at the school. *See id.* The testimony indicated that while the school has had some recent social events at a park, there was an all-school social event on the subject site as recently as the Fall of 2004.

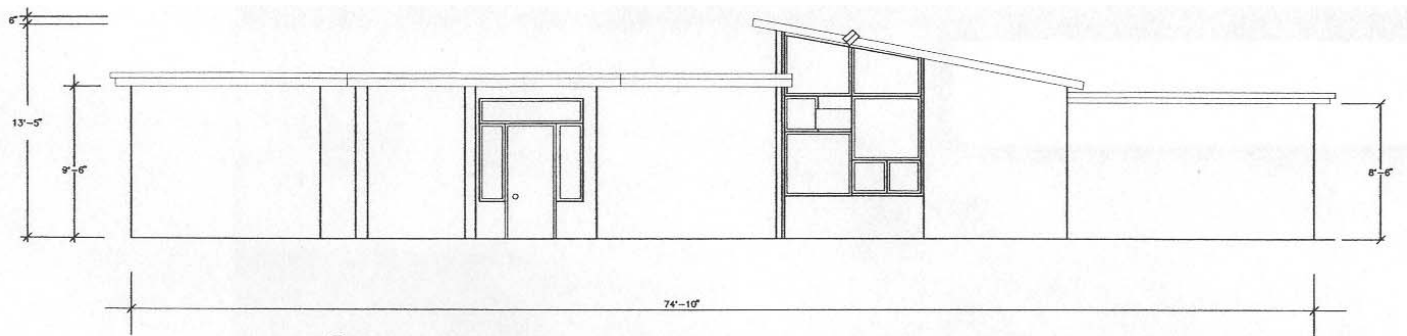
To avoid adverse effects due to parking spill-over, and to ensure that the proposed modification does not intensify the impacts of this use on the neighborhood, the recommended conditions of approval include a condition that would limit Petitioner to no more than four events per year (including the two mandatory all-parent meetings) with an attendance resulting in more vehicles than can be accommodated by the gravel parking area in front of the school and the paved area on the west side of the school building. The four-event limit is designed to permit the two mandatory parent meetings and two "work days" each year. If Petitioner wishes to also hold parent education meetings or other activities, attendance will have to be limited to the number that can be accommodated by the parking spaces available for this site.

The footprint of the proposed addition may be seen on the map on the next page, which is a version of the Topographic Survey that was used at the hearing, and includes handwritten notations. If the Board elects to approve the proposed modification, the recommended conditions of approval include the submission of a document entitled "Site Plan," which will show the proposed addition and other salient features, such as existing and proposed fencing and light fixtures.

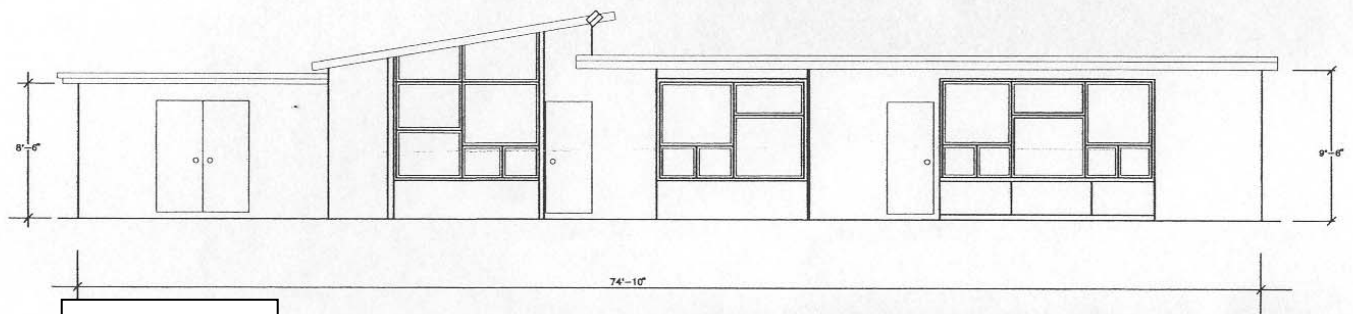
**Aerial View of Proposed Addition, from earlier version of  
Topographic Survey, Ex. 22**



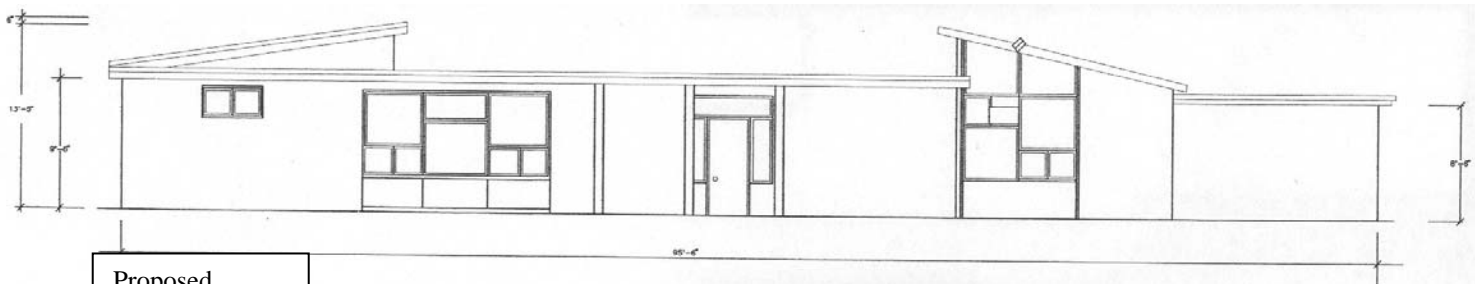
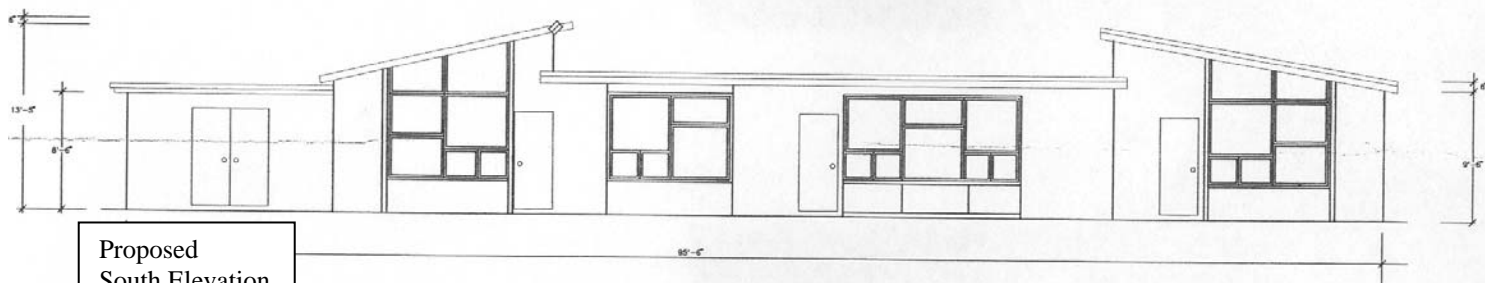
The north and south elevations of the existing building are shown on the next page, followed by the north and south elevations with the proposed addition.

**Existing Elevations, from Ex. 5(a)**

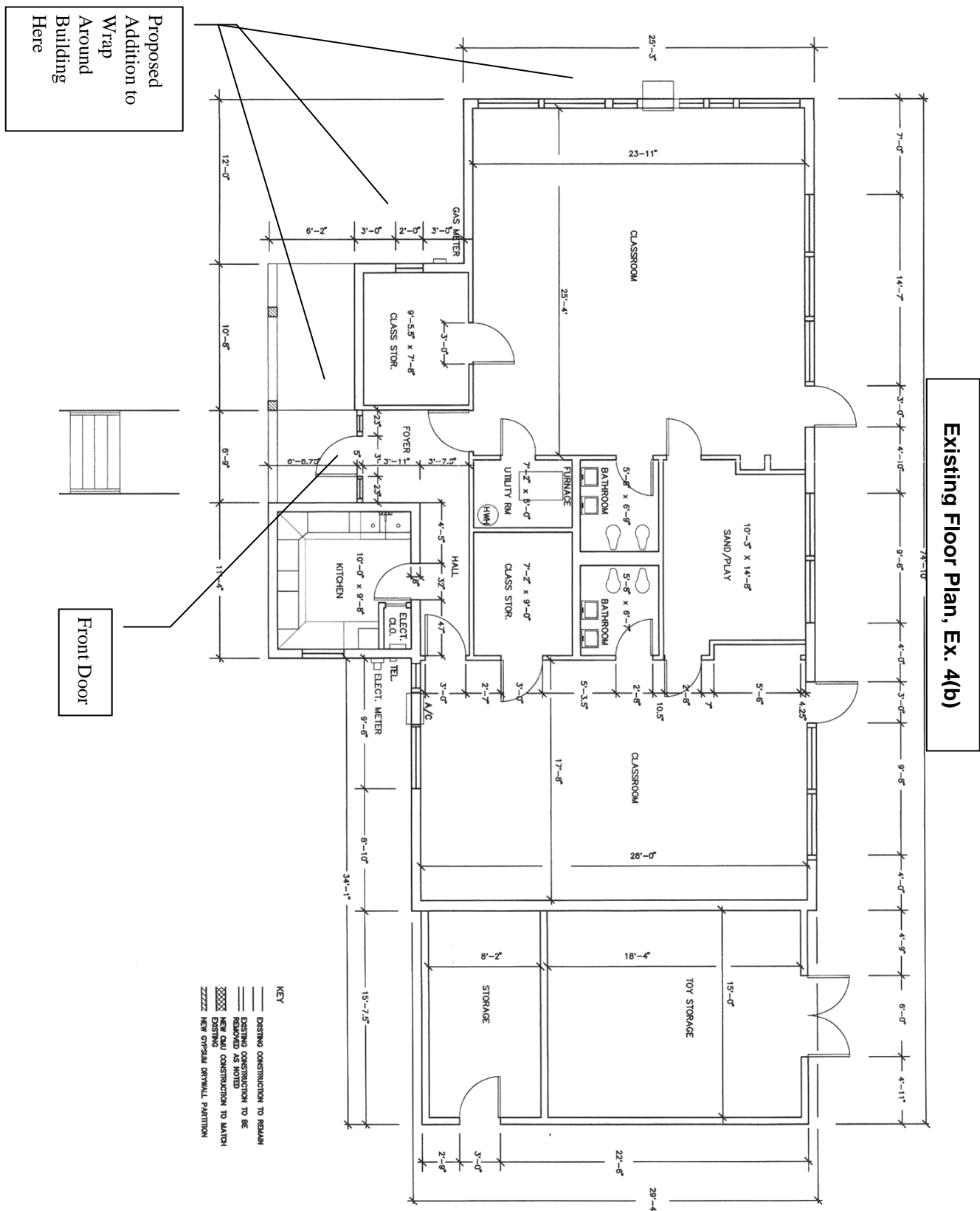
North Elevation



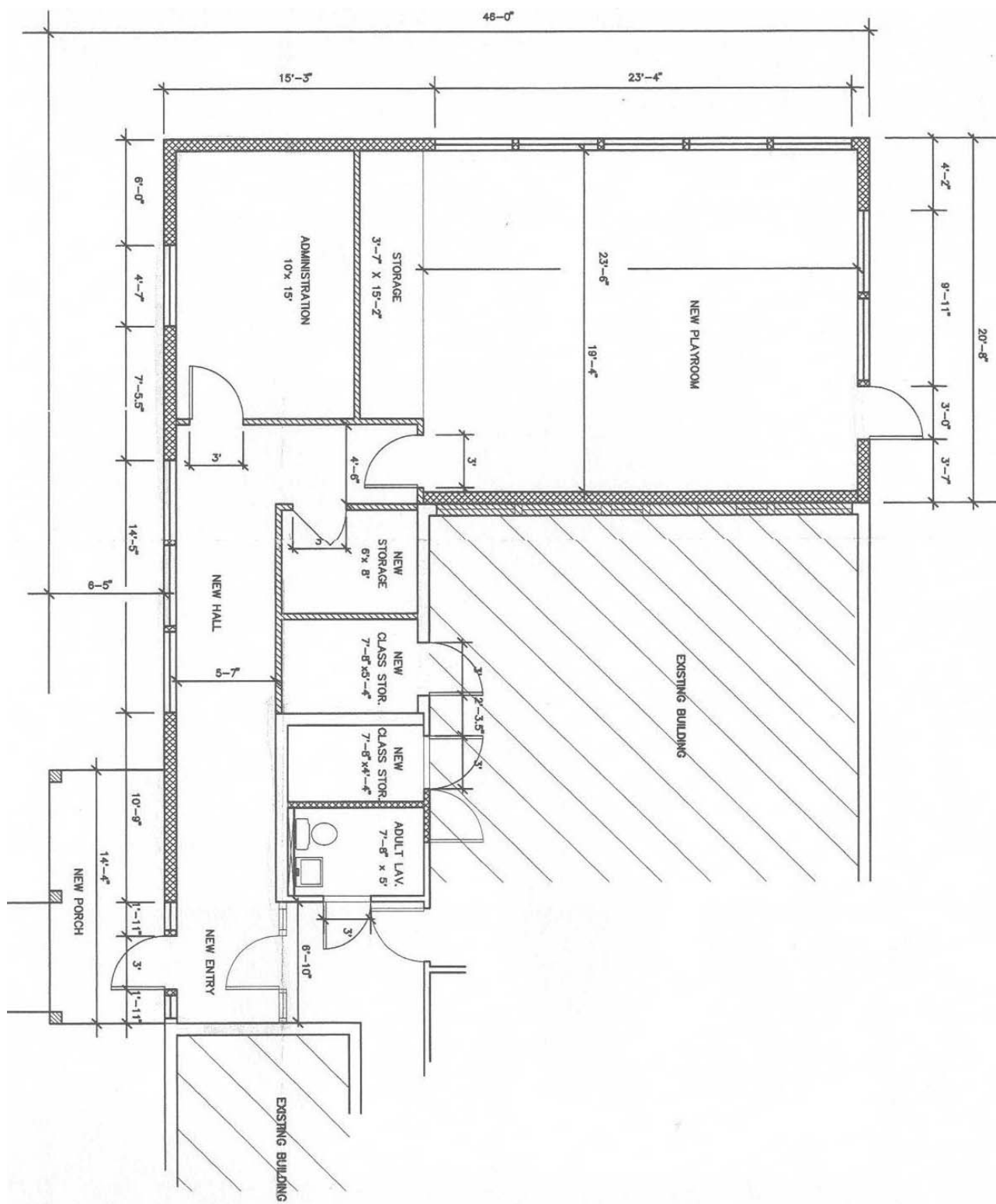
South Elevation

**Proposed Elevations, from Ex. 5(b)**Proposed  
North ElevationProposed  
South Elevation

The existing floor plan is shown below, followed by a partial floor plan showing what changes would take place with the proposed addition.



### Proposed Floor Plan Changes, Ex. 4(c)



### ***E. Traffic and Parking***

Petitioner proposes to maintain its current class schedule, which is summarized in the table below:

	<b>Monday</b>	<b>Tuesday</b>	<b>Wednesday</b>	<b>Thursday</b>	<b>Friday</b>
<b>Classroom One, Morning</b>	9:00- 11:30	9:00- 11:30	9:00- 11:30	9:00- 11:30	9:00- 11:30
<b>Classroom Two, Morning</b>	9:00- 11:30	9:00 – 11:00	9:00- 11:30	9:00 – 11:00	9:00- 11:30
<b>Classroom One, Afternoon</b>	12:00 – 2:30		12:00 – 2:30		12:00 – 2:30
<b>Classroom Two, Afternoon</b>		11:30 – 1:30		11:30 – 1:30	

Given that no increase in enrollment or staffing is proposed, the modification would not result in any increase in the number of trips generated by the school. The evidence suggests that the number of trips the school generates is not a burden on the local road network. Whether there is adequate space for parking, however, is a more difficult issue.

On weekday mornings, Petitioner has two classes starting at 9:00 a.m., with 15 children in one classroom and 14 in the other, for a total of 29 children starting class at the same time. Because the school is a cooperative, each class has a degreed teacher, plus two parents who work on a rotating basis. Thus, there are six adults on site when both classrooms are being used: two teachers and four co-op parents.

Technical Staff reports that there is space for about 13 cars to park in a gravel area along the front of the school. See Staff Report at 3. In addition, the submitted maps show a paved parking area at the west end of the site, with room for approximately two or perhaps three vehicles (see photograph below). Hearing testimony indicated that at the east end of the site, the front parking area is deep enough to park two cars end-to-end, so parents who are serving as assistant teachers park in the deeper spaces, leaving the spaces behind them for parents who are dropping off children and not staying for the length of the class. The testimony does not indicate how many cars can fit in the deeper spaces, but using a scale, the Hearing Examiner estimates that number at three.

**Photograph of Paved Parking Area On Site, West of Building. Ex. 23, photo 8**

One issue that was not identified during the hearing is that, due to the angle of the property line, roughly half of the parking spaces that the school uses along the front of the site appear to be partly or fully off school property, in the public right-of-way. There is no record of complaints about this fact, which is not apparent on the ground – only on a map. See Topographic Surveys, Exs. 22 and 41(d), shown on pages \_ and \_ above. As shown in the photographs that follow, there is a clear delineation between the gravel parking area and the paved roadway surface. This makes it easy for drivers to distinguish between the area used for school parking and what they would recognize as “the street.” In light of the very small number of homes that are served by this segment of Decatur Avenue, and the total absence of any evidence suggesting that the neighbors suffer any adverse effects from the school’s use of road right-of-way for parking, the Hearing Examiner concludes that this long-standing practice does not have a material adverse impact on the neighborhood. Even including the spaces that are partly or wholly in the public right-of-way, however, the number of spaces may not be sufficient.

**Front Parking Area, Ex. 24, photo 1**



**Front Parking Area, Ex. 24, photo 4**





**Front Parking Area, E. 24, photo 5**

Adding together three spaces on the west side of the building, plus 13 spaces across the front, plus three double-depth spaces, the Hearing Examiner estimates that Petitioner has 19 parking spaces available, either on-site or immediately adjacent to the property's street frontage. Petitioner's representatives at the hearing testified that about one third of the students walk to school, and some come in car-pools, so they do not have 29 cars arriving all at once, even though there are 29 children enrolled in classes that start at 9:00 a.m. In addition, they noted that four parents each morning are serving as assistant teachers, and they are supposed to arrive early. Both witnesses testified that there are no significant parking problems, although their testimony and input from neighbors indicated that there is an ongoing concern about speeding and traffic safety. Both of the neighbors who participated in this case questioned the adequacy of available parking, and noted that they have never observed significant numbers of children walking to the school.

Technical Staff opined that the available parking is adequate for the use. This opinion was based, however, on an apparent misunderstanding of the nature of the use. Transportation

Planning Staff analyzed the parking adequacy by comparing the situation to the parking requirement for a child day care center, which requires one pick-up/drop-off space for every six students. See Suppl. Staff Report, Ex. 19 at 5. The key distinction between a child day care center and a private educational institution, from a traffic and parking perspective, is that students at a school need to arrive at approximately the same time, when class begins. At child day care centers, children are dropped off at varying times, depending on the parents' work schedules. Accordingly, a private educational institution needs a larger parking area than a child day care center with the same number of children.

One cannot count on a certain percentage of students arriving by carpool or on foot, absent a condition requiring it, which would be unworkable. Moreover, unless there is a great deal of turnover among the neighborhood residents, it seems implausible that the small area within comfortable walking distance of the site for parents transporting small children could continuously produce 10 children who would all attend this cooperative nursery school.<sup>1</sup> In the Hearing Examiner's view, therefore, the question is whether the site can accommodate the arrival of 29 children, by car, at approximately 9:00 a.m. every weekday. Despite the testimony provided by Petitioner's witnesses, the Hearing Examiner is not persuaded that the number of parking spaces available at this site is adequate to avoid on-street queuing. Although the street serves only a small number of homes, it is exceptionally narrow, leaving little room for waiting vehicles and departing vehicles to maneuver. A simple solution would be for the school to stagger its starting times – to have one morning class start at 9:00 a.m. and the other at 9:30. This would require corresponding changes to the afternoon schedule, to preserve the 30-minute transition period between morning classes and afternoon classes. It would cut in half the number of children arriving at 9:00 a.m., with a corresponding decrease in the number of cars looking for parking on this narrow street. To achieve this goal and reduce adverse impacts on the neighborhood, the recommended conditions of approval include a condition requiring staggered class times, although this condition has not been discussed with Petitioner.

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<sup>1</sup> Roughly one third of 29.

### ***F. Stormwater Management***

The issue of greatest concern in this case is stormwater management. The evidence indicates unmistakably that there is a serious drainage problem on and around the subject property. As shown in the photographs that follow, which were submitted by abutting property owner Art Gehringer, the subject site and some of its immediate neighbors have an ongoing problem with standing water. The principal cause of this problem appears to be the lack of curb and gutter on Decatur Avenue. Without any sewers to flow into, run-off from the road flows down the east side of the subject property and the west side of neighboring yards, and settles in the backyards of the subject property and some of its neighbors. All parties agreed that the drainage problem got much worse after six new homes were built on the north side of Decatur Avenue, diagonally across from the subject property.

**East Side of Nursery School Backyard, Looking North, with  
Corner of Building Visible in Upper Left. Ex. 26, photo 2**



**View from Gehringer Rear Yard into School Rear Yard, Looking Northwest.**

**Water Flowing under Fence from School Yard. Ex. 26, photo 1**



**Water Flowing from Decatur Avenue through Rear Yards of Pearson Street Homes, West of Nursery School. Ex. 26, photo 4**



**Water Flowing South from Gehringer Yard into**

**Neighboring Pearson Street Lot. Ex. 26, photo 5**

The Staff Report indicated that stormwater management could be discussed during subdivision review, which will be required if the modification is approved.<sup>2</sup> Staff also indicated, however, that it might be possible for the proposed project to qualify for a “minor” subdivision review process, which would not require detailed review of stormwater management issues. As noted by Mr. Gehringer, the construction of the proposed addition would reduce the area of unpaved land available to soak up run-off on the east side of the site, right where some of the run-off typically flows. This could well make the problems with drainage and standing water worse than under current conditions.

At the hearing, Petitioner stated an intention to address stormwater management during subdivision review. The Hearing Examiner, however, felt that in order to make a decision on the modification, the Board would need some indication of whether stormwater run-off controls could feasibly be installed in a way that would limit adverse effects sufficiently to support approval of the modification. Accordingly, Petitioner was directed to prepare a stormwater management plan, in

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<sup>2</sup> Re-subdivision will be required to create a single lot, because the existing building straddles the line between the school’s two recorded lots, and DPS will not issue a building permit for construction across common lot lines.

consultation with the Department of Permitting Services (“DPS”) and Technical Staff, and to submit it as part of the modification proposal. The Hearing Examiner imposed this requirement with the expectation that DPS would review the proposed plan. In fact, DPS chose not to review the plan, because with less than 5,000 square feet of land disturbance, the proposed project is exempt from stormwater management requirements. See Ex. 31. DPS suggested that the “nuisance drainage” from the street be reported to the Montgomery County Department of Public Works and Transportation (“DPW&T”), which is responsible for roadway maintenance.<sup>3</sup>

Fortunately, Petitioner did not seek to avoid installing any stormwater management controls based on this exemption; that course of action likely would have led to a recommendation of denial. Instead, Petitioner submitted stormwater management plans to Technical Staff, which were reviewed by Environmental Planning Staff and deemed acceptable. See Ex. 33(a). Technical Staff notes that it has neither authority nor expertise in implementing the county’s stormwater management regulations. See *id.* Nonetheless, Staff was willing to make some observations, for which the Hearing Examiner is most appreciative, given that DPS provided no substantive commentary.

Technical Staff notes that the subject property is on the west ridge of a small watershed, and the adjoining properties to the east are built on a natural drainage channel. This channel carries water draining from properties to the north and off Decatur Avenue. Water drains through the backyards of the adjoining properties and onto McComas Avenue, where it flows into the storm drain system. Staff notes that although the proposed addition is exempt from stormwater management regulations, Petitioner has offered to install an infiltration trench that would be instrumental in mitigating any additional run-off caused by the proposed addition. See *id.* Staff notes that the larger drainage problem would remain, but infiltration trenches, rain barrels and rain gardens are all helpful in nuisance drainage situations like this one. Staff suggests that the neighbors may wish to petition DPWT or the

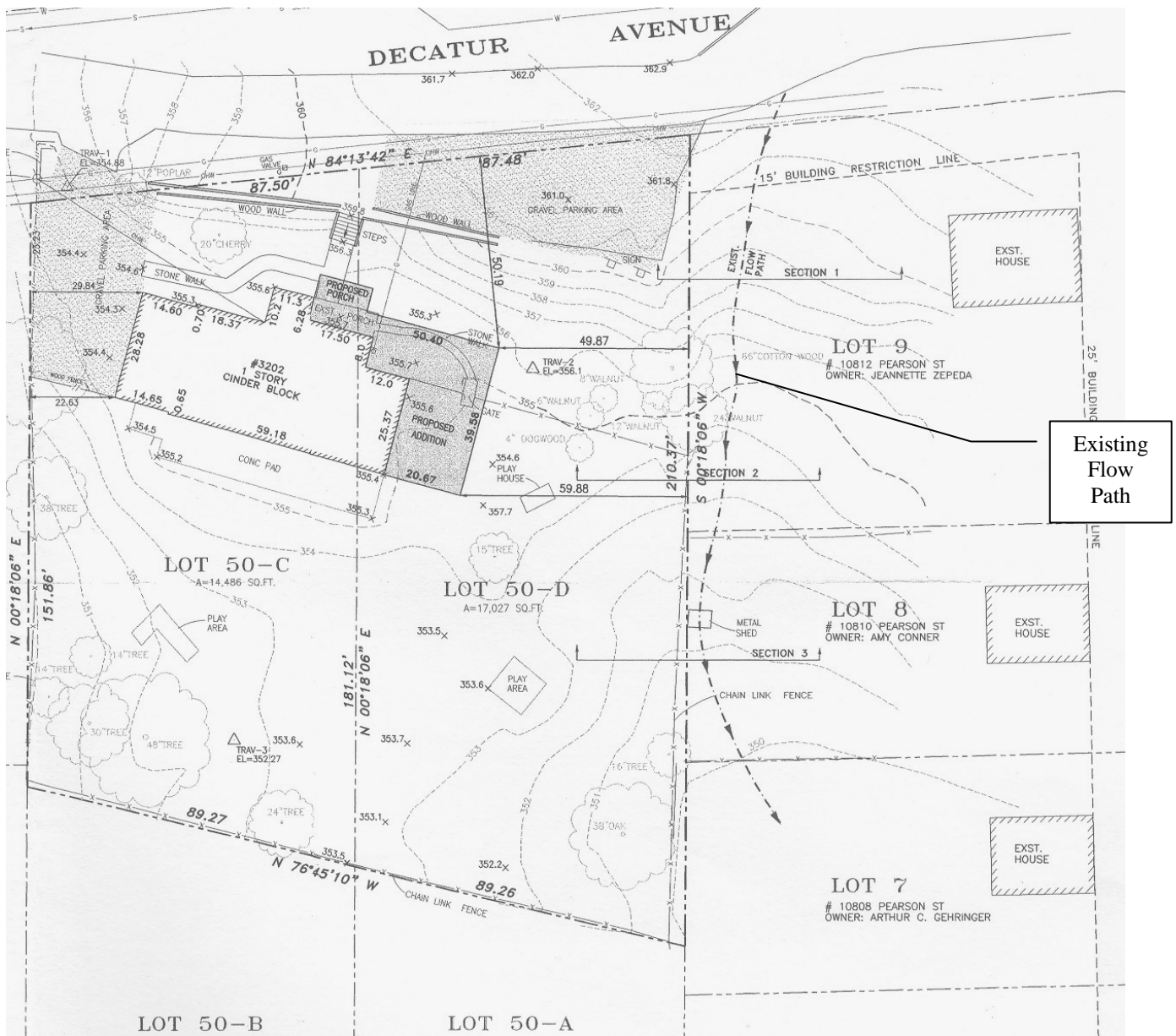
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<sup>3</sup> The Hearing Examiner communicated the name and number provided by DPS directly to Mr. Gehringer in a letter sent with this report. Petitioner may wish to follow up on this issue as well. DPS recommends contacting Michael Mitchell at DPW&T, 240-777-7262.

County Department of Environmental Protection to install a rain garden at the head of the drainage channel, with plants that would capture and slow water run-off.<sup>4</sup> See *id.*

One point of confusion is that Petitioner has submitted one document entitled "Stormwater Management Plan," Exhibit 41(b), and another entitled "Stormwater Management Concept Plan," Exhibit 41(c). The former, which is reproduced below, appears to be an existing conditions plan, showing the existing flow path of run-off from Decatur Avenue.

**Stormwater Management Existing Conditions Plan, Ex. 41(b)**

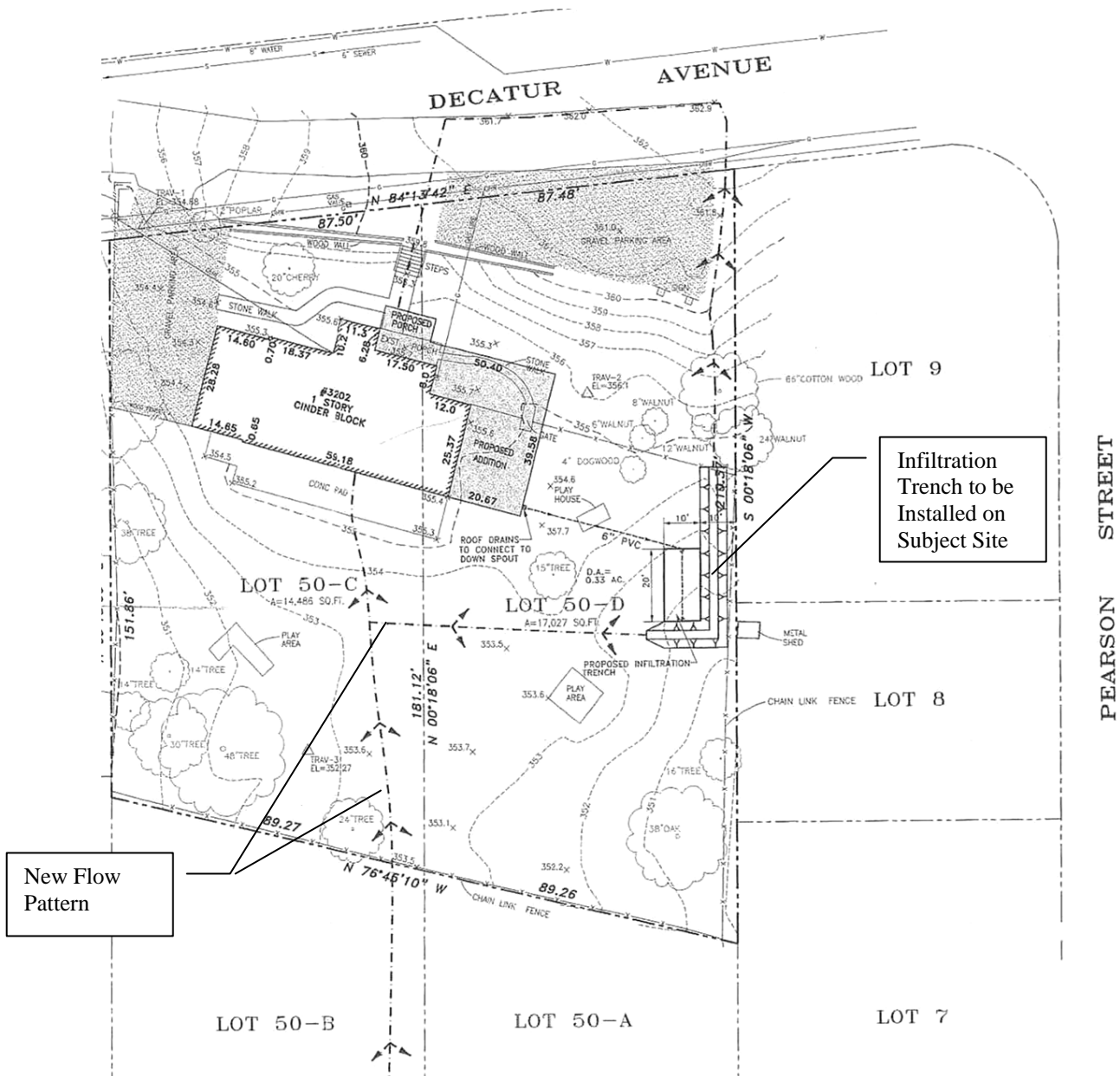


<sup>4</sup> This suggestion was included in the letter to Mr. Gehringer.



The Stormwater Management Concept Plan, reproduced below, depicts an infiltration trench that would capture water flowing down the east side of the subject property and direct it towards a natural drainage divide in the middle of the property. This would cause it to flow across the lot immediately south of the subject property, rather than the water-laden lots abutting to the east. From there, run-off would flow into McComas Avenue, which has storm drains. This might cause an adverse impact on the property immediately south of the subject property, but presumably the infiltration trench would control the rate of flow sufficiently that the run-off would not be a noticeable problem.

## Stormwater Management Concept Plan, Ex. 41(c)





Given the favorable view expressed by Technical Staff, the Hearing Examiner believes the record contains sufficient information regarding stormwater management to support a favorable decision on the proposed modification. The submitted stormwater management concept plan suggests that measures can be implemented that would mitigate additional run-off caused by the addition, avoiding any worsening of the existing drainage problem on the abutting properties to the east, and perhaps improving conditions overall. The recommended conditions of approval require Petitioner to request detailed review of stormwater management for this site during subdivision review, and also require compliance with the submitted stormwater management concept plan or such other stormwater management plan as may be approved by appropriate governmental authorities at the time of subdivision approval.

### ***G. Lighting, Landscaping and Fencing***

The existing building has one dusk-to-dawn flood light at the rear and one in the front. Petitioner proposes to install one additional dusk-to-dawn flood light at the southeast corner of the addition, about 60 feet from the nearest property line and 140 feet from the rear of the closest houses on Pearson Street. Petitioner indicates that the light fixtures would be shielded, with a 75-watt bulb and a radius of ten feet. See cut sheets, Exs. 26 and 28. Technical Staff finds that this single floodlight will not cause objectionable glare, given that it is similar to exterior lighting found on many homes to illuminate yards, driveways or garages and enhance security for individual homeowners. See Ex. 39. Petitioner's testimony indicated that most of the neighbors like having lights on in the school's back yard for security, and because some of them walk their dogs back there.

As noted earlier, landscaping consists of shrubs and flowers near the building, with grass and scattered shrubs and trees. Technical Staff suggests that two trees would be removed in connection with the proposed construction, but without identifying the particular trees. Petitioner's witnesses identified them as a small evergreen in front of the building, and a 15-inch diameter deciduous tree just southeast of the building. Petitioner would prefer not to remove the 15-inch tree if

possible, and agreed to replace that tree with a similar variety if the existing tree dies as a result of the construction.

The site lacks evergreen landscaping or opaque fencing along most of the property lines. There are scattered trees and shrubs on site, including some near the property lines, but as the photographs below make clear, existing landscaping is not sufficient to “protect adjacent properties from noise, spill light, stray balls and other objectionable impacts,” as required under Section 59-G-2.19(a)(4)b. Technical Staff found that the existing trees and chain link fencing provide adequate screening from neighboring properties, but suggested that the Board “may wish to consider requiring a solid fence along the property lines.” Ex. 19. Petitioner’s witnesses felt such a fence was unnecessary.

**East Property Line, Looking South. Pearson Street Homes on Left.  
Ex. 24, Photo 7**



**East Property Line Looking North towards Fence Separating  
Front and Rear Yards. Pearson Street Homes on Right. Ex. 24, Photo 8**



Both of the neighbors who participated in this case noted the lack of screening. Photographs and other evidence demonstrate that Petitioner makes use of the full area of its back yard, and no indication was given as to whether outdoor play time is limited to one class at a time, or to certain times of day. Moreover, the relatively small distances between buildings and the scattered landscaping on the subject property are inadequate to buffer adjoining homes from the noise and visual impact of the subject facility. Accordingly, the Hearing Examiner recommends that Petitioner be required to replace its existing chain link fencing with solid wood fencing.<sup>5</sup> I have specified solid wood, rather than board-on-board, because solid wood tends to have a better noise-buffering impact.

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<sup>5</sup> Petitioner may object to installing a fence along the western property line, where the neighboring property or properties already have a wooden fence. A special exception holder, however, is not generally permitted to rely on fencing or other buffering on a neighboring property, because that property owner cannot be required to maintain such fencing or buffering for the life of the special exception.

### ***H. Community Participation***

The record includes two letters from neighborhood resident Amy Connor, who objects to the proposed modification on several grounds. See Exs. 13 and 18. One of her primary concerns is whether the new multi-purpose room would lead to an increase in large parent meetings, which result in heavy on-street parking in the immediate vicinity of the site. As noted earlier, the Hearing Examiner has addressed this concern with a recommended condition that would strictly limit the number of large events on site.

Ms. Connor suggests that the nursery school is not permitted to have more than 20 students on site at any given time, under criteria established by the National Association for the Education of Young Children, a voluntary pre-school accreditation organization. Ms. Segal-Turner stated that Ms. Connor's analysis is incorrect. More importantly, the Board of Appeals' jurisdiction does not extend to enforcing standards established by a non-governmental entity.

Ms. Connor also argues that the modification should be denied because she believes the additional space is not necessary. As the Hearing Examiner explained during the hearing, whether or not there is a "need" for additional space is only marginally relevant to the Board's consideration. Petitioner has elected to propose a building addition, and the Board's responsibility is to assess whether the proposed modification of the special exception would have adverse effects on the neighborhood sufficient to warrant denial of the request.

The most serious issue Ms. Connor raises relates to stormwater drainage, which is discussed in more detail on Part II.F. above. She alleges that after homes were built to the north of the subject site, making existing drainage problems worse, the nursery school responded "by building up its property level to flood neighboring properties." See Ex. 13. Helene Segal-Turner, who has been a teacher at the nursery school for 15 years, testified that she has no idea what Ms. Connor is referring to, except that the school put in a path some years ago. The school also paved the side parking lot about seven years ago, but that is on the west side of the building, while Ms. Connor's concerns appear to center on the east side of the building. Tr. at 63. School representative Jessie McGinley added that

the school sometimes puts down mulch, which deteriorates and washes away, but has not made any structural changes to the landscape at all. Unfortunately, Ms. Connor was not available at the hearing to explain what she was referring to.

Both of Petitioner's witnesses confirmed that it gets muddy on the playground, Ms. Segal-Turner noting that it always has. There is a low spot in the backyard, in the middle of the playground, and there is a natural slope that runs along the chain link fence on the east side of the site, so that's where the water flows. Ms. McGinley noted that Ms. Connor's property appears to be a low point, so she gets a lot of water.

Ms. Segal-Turner confirmed, as stated in Ms. Connor's first letter, that at a meeting at the school in September 2004, she told Ms. Connor that if the proposed construction was going to cause a drainage problem, the school would address it.

Finally, Ms. Connor contends that Technical Staff's analysis of parking adequacy is faulty. Ms. Connor concedes that she is not present on a daily basis, but notes that she has never seen less than 16 cars arriving at the school around 9:00 a.m., and has sometimes seen as many as 20. In addition, she has never witnessed significant numbers of children walking to the school. See Ex. 18.

The only witness at the hearing not associated with the school was Art Gehringer, whose home faces Pearson Street and backs onto the subject property. As summarized in Part III below, Mr. Gehringer's testimony focused principally on drainage problems, but also touched on the lack of screening in the back yard and problems with inadequate parking and traffic safety.

### **III. SUMMARY OF HEARING**

#### ***A. Applicant's Case in Chief***

Petitioner's testimony alternated between the school's two witnesses, depending on the subject matter. The testimony of each witness is summarized below, with occasional overlap.

1. Jessie McGinley

Ms. McGinley is a parent of a child who attends the nursery school. Because the school is a cooperative, she is also a part-owner. Ms. McGinley described the main purpose of the proposed addition as creating a multi-purpose room that could be used as a play area (a “large motor activity room”) during bad weather. She noted that the need for such a space came to light during the sniper incident, in the fall of 2003, when the children could not leave the building for a period of almost two months. She noted, in addition, that the school’s administrative space is limited to a filing cabinet and telephone system in the kitchen, storage space is very limited, and the school lacks an adult-size, handicapped-accessible bathroom.

Ms. McGinley stated that the multi-purpose room also would be used for meetings to which all the parents are invited, which typically take place once in August and once in May each year, for about an hour. The school has 63 to 65 children enrolled each year, but not all of the parents attend each meeting, and Ms. McGinley estimated that at least a third of the parents live within walking distance of the school. When asked whether the school would commit to no more than two all-parents-invited meetings per year, Ms. McGinley replied “That’s all we have. We have it on our school calendar every year. That’s exactly what we have.” Tr. at 12. The Hearing Examiner interprets this response as consent to such a limitation.

Ms. McGinley testified that in recent years, the school has had social events at a park, rather than at the subject site, both to avoid impacts on the neighborhood and because a park provides more space. In response to a question from Mr. Gehringer, she conceded that in fact, the school had a large social event at the subject property as recently as the Fall preceding this hearing.

Ms. McGinley stated that she had read both the original Staff Report and the supplemental report, she agreed with their conclusions, and she wished to adopt them as part of the school’s evidence.

Ms. McGinley described the existing site and the proposed addition, referring to both the submitted plans and a series of photographs. During a discussion of which trees might be affected by

the proposed construction, Ms. McGinley stated that the school has no desire to remove an existing 15-inch-diameter tree, southeast of the building, that was identified in the Staff Report for possible removal. Ms. McGinley, with Ms. Segal-Turner's consent, agreed to a condition that would require the school to plant a similar variety of tree in that general location if the tree in question dies as a result of the proposed construction. Tr. at 44-45.

Regarding parking, Ms. McGinley testified that in her experience, there is sufficient parking for the school's needs, and there are no noticeable back-ups – certainly not from Decatur Avenue to Pearson Street. She and Ms. Segal-Turner noted that at the east end of the front parking area, the parking area is deep enough to park two cars end-to-end. The parents who are serving as assistant teachers park in the front spaces in that area, to leave the outer spaces for parents who are dropping off or picking up a child. Both morning classes start at the same time, 9:00 a.m. Thus, 29 children arrive at approximately the same time. Ms. McGinley noted that two parents in each class are there to assist the teachers, and those parents are supposed to arrive early. She estimated that about one third of the children walk to school. She and Ms. Segal-Turner emphasized that between walkers, carpoolers, and co-op parents arriving early, they do not have 29 cars arriving all at once.

Turning to the question of visual buffering for the neighbors, Ms. McGinley and Ms. Segal-Turner both said they do not get complaints from the neighbors about noise or visual intrusion. They noted that most people are at work during the hours that the nursery school is open. The Hearing Examiner asked the witnesses' view of Technical Staff's statement that the Board may wish to consider requiring a solid fence along the property line. Both Ms. McGinley and Ms. Segal-Turner stated that they saw no need for a fence, unless it would help with stormwater management. They noted that the neighbors immediately to the west have installed their own fence.

2. Helene Segal-Turner, Nursery School Director.

Ms. Segal-Turner testified that the school would be willing to accept a condition limiting the number of children on site at one time to 29 (15 children in one classroom and 14 in the other). Tr. 18-20. This is lower than the number of children permitted on site at one time under the terms of the

special exception, which is 40. It is probably also lower than the number permitted under state regulations, although neither Ms. Segal-Turner nor Ms. McGinley could recall what the limit on the school's state license is.

Ms. Segal-Turner explained in some detail when classes take place in each of the two classrooms. One classroom has a class five mornings per week and a class three afternoons a week. The other classroom has a Monday-Wednesday-Friday morning class, a Tuesday-Thursday morning class, and a Tuesday-Thursday afternoon class. Afternoon classes end at 1:30. In addition, on Monday, Wednesday and Friday, the school offers an "extended day" option to 2:30. There is a 30-minute break between the end of morning classes and the beginning of afternoon classes. Because the school is a cooperative, each class has a degreed teacher, plus two parents who work on a rotating basis. The parents go through training and are considered assistant teachers. The school currently has one full-time teacher, Ms. Segal-Turner, and two part-time teachers, in addition to the parent-assistance teachers. During class time, there are six adults on site, four of whom are parents of students.

Ms. Segal-Turner specified that the nursery school follows the Montgomery County Public Schools calendar, and is closed during the summer.

Regarding parking, Ms. Segal-Turner testified, with Ms. McGinley, that parents who are coming to assist teachers for the duration of a class parking in deep spaces that leave room for another car behind them. She stated that in general, the school does not have parking problems, although it can be pretty hectic at pick-up and drop-off times. She noted that several years ago, the school paved over a grassy area abutting the building to the west, to turn it into additional parking. The Hearing Examiner noted that any permanent, physical change to the site must be approved in advance by the Board, so approval for that change should have been requested in advance as a modification of the special exception.

Ms. Segal-Turner testified that the school has made significant efforts to get its parents and the neighbors to slow down on Decatur Avenue, including posting a sign that says "slow," asking



neighbors to slow down, and asking parents to slow down via the school newsletter. Tr. at 91-92. She has also asked neighbors, at a neighborhood meeting the school convened, whether they would like to have speed bumps, and they did not. She noted that the neighbors often use the school parking lot when the school is closed, and sometimes she has to ask them to move their cars to make room for drop-offs and pick-ups.

### ***B. Community Participation***

#### **1. Art Gehringer**

Mr. Gehringer lives on Pearson Street (Lot No. 7 on the submitted plan), and his back yard abuts the subject site. He testified that he has lived at this location for 28 years and has enjoyed having the nursery school as a neighbor. He is concerned about the proposed addition, principally because of the drainage problem. Mr. Gehringer presented a series of photographs depicting standing water on his property, which he says comes down through the subject property and the backyards of neighboring properties “like a river.” Tr. at 78. He noted that in addition to the channel that comes through the subject site from the street, there is another, smaller channel that starts at the southeast corner of the nursery school building. Tr. at 81.

Mr. Gehringer questioned how the school can have 29 children dropped off at 9:00 a.m. without ending up with cars standing on Decatur Avenue, waiting for a parking space. He noted that he is not generally home at 9:00 a.m., but he has never seen more than two or three children walking towards the school from his vantage point, which is east of the school. Mr. Gehringer also expressed a concern about traffic safety, noting the “minivan parade” that goes down his street every morning, many of them speeding. He noted that when the school has a school-wide event, the parking overflows into the neighborhood. He does not consider it a big deal for that to happen a couple of times a year, because the same thing happens if one of the neighbors has a party.

Mr. Gehringer noted that one of his children attended the school, and he was a parent assistant. He found that the school functioned quite well with its existing space, and he doesn’t see a need to enlarge the building. Tr. at 95-96. He is concerned that if the school takes on the expense of

building an addition, either there will be a request to increase the enrollment in the future to pay for it, or building maintenance will suffer due to lack of funds. In response, Petitioner's witnesses agreed to a condition that would prohibit any additional modification request within five years after the present one is granted; they were not comfortable with a period longer than five years, because neither one expects to be part of the school longer than that (Ms. McGinley's child will "age out" of the school, and Ms. Segal-Turner feels she is not far from retirement). Mr. Gehringer took little comfort from this agreement; having lived in his current home for 26 years, he considers five years "a drop in the bucket." Tr. at 106-107.

### ***C. People's Counsel***

The People's Counsel, Martin Klauber, participated in questioning witnesses and discussing possible approaches to getting a complete record on the issue of stormwater management.

## **IV. CONCLUSIONS**

A special exception is a zoning device that authorizes certain uses provided that pre-set legislative standards are met. Pre-set legislative standards are both specific and general. The special exception is also evaluated in a site-specific context because there may be locations where it is not appropriate. Weighing all the testimony and evidence of record under a "preponderance of the evidence" standard (see Code §59-G-1.21(a)), the Hearing Examiner concludes that the proposed modification, with the conditions recommended at the end of this report, would satisfy all of the specific and general requirements for the use.

### ***A. Standard for Evaluation***

The standard for evaluation prescribed in Code § 59-G-1.21 requires consideration of the inherent and non-inherent adverse effects of the proposed use, at the proposed location, on nearby properties and the general neighborhood. Inherent adverse effects are "the physical and operational characteristics necessarily associated with the particular use, regardless of its physical size or scale of operations." Code § 59-G-1.21. Inherent adverse effects, alone, are not a sufficient basis for denial of

a special exception. Non-inherent adverse effects are “physical and operational characteristics not necessarily associated with the particular use, or adverse effects created by unusual characteristics of the site.” *Id.* Non-inherent adverse effects, alone or in conjunction with inherent effects, are a sufficient basis to deny a special exception.

Technical Staff have identified seven characteristics to consider in analyzing inherent and non-inherent effects: size, scale, scope, light, noise, traffic and environment. For the instant case, analysis of inherent and non-inherent adverse effects must establish what physical and operational characteristics are necessarily associated with a private educational institution. Characteristics of the proposed modification and the underlying use that are consistent with the characteristics thus identified will be considered inherent adverse effects. Physical and operational characteristics of the proposed modification and the underlying use that are not consistent with the characteristics thus identified, or adverse effects created by unusual site conditions, will be considered non-inherent adverse effects. The inherent and non-inherent effects thus identified must be analyzed to determine whether these effects are acceptable or would create adverse impacts sufficient to result in denial.

The following may be considered inherent characteristics of a private educational institution: buildings adequate to house the students and activities; parking facilities; lighting; educational activities and events during standard operating hours; a limited number of special events; noise from outdoor activities; students, faculty and support staff; traffic associated with transporting students and staff; and environmental effects such as storm water run-off.

In this case, Technical Staff identified the nursery school's location, interior to a residential community and on a street with two dead ends, as a non-inherent adverse effect. The Hearing Examiner agrees that the unusual character of this segment of Decatur Avenue should be considered an unusual site condition that constitutes a non-inherent adverse effect. The Hearing Examiner has identified three additional non-inherent adverse effects: (1) the fact that several of the parking spaces used by the school are not actually on school property, but rather are partly or wholly in the public right-of-way; (2) the school's location on a street with no storm sewers, together with the

existence of a natural drainage channel across the subject property and abutting properties that leads to chronic drainage problems; and (3) insufficient parking to accommodate the current class schedule.

As discussed in Part II.E., the school's use of the public right-of-way for parking is a longstanding circumstance that does not appear to cause significant adverse effects for the neighbors. Moreover, the adverse effects of the school's location on a narrow street, and of its limited parking, would be reduced to an acceptable level if class times were staggered, so that only one class starts at 9:00 a.m., rather than two. The evidence also supports a conclusion that any increase in stormwater run-off caused by the proposed construction would be mitigated by the installation of an infiltration trench.

The remaining characteristics of the proposed modification and the underlying use can be considered inherent, as there is nothing unusual about the size of the building as proposed, or the operation of the school. As a nursery school operating during limited hours, with no after-school or summer activities, the Kensington Nursery School has lesser impacts than a typical private educational institution providing elementary or secondary education. Moreover, with the recommended fencing, neighbors would be buffered from the most significant impact other than parking, which is the noise and visual intrusion of back yard activity.

For all of these reasons, the Hearing Examiner concludes that with the conditions recommended at the close of this report, the inherent and non-inherent adverse effects of the subject use, with the proposed modification, are not sufficient to warrant denial.

### ***B. Specific Standards***

The specific standards for a private educational institution are found in Code § 59-G-2.19. The Technical Staff reports and the Petitioner's written evidence and testimony provide sufficient evidence that with the recommended conditions, the proposed modification would be consistent with these specific standards, as outlined below.

#### **Section 59-G-2.19. Educational institutions, private.**

(a) **Generally.** A lot, tract or parcel of land may be allowed to be used for a private educational institution if the board finds that:

- (1) the private educational institutional use will not constitute a nuisance because of traffic, number of students, noise, type of physical activity, or any other element which is incompatible with the environment and character of the surrounding neighborhood;

Conclusion: The Kensington Nursery School, with the proposed addition and the recommended conditions of approval, would not create any conditions that rise to the level of a nuisance. Even without the recommended conditions, the evidence would not support a conclusion that the adverse effects of the parking problems and lack of buffering, or the increase in run-off that might be attributable to the proposed addition, are severe enough to be considered a nuisance.

- (2) except for buildings and additions thereto completed, or for which a building permit has been obtained before (date of adoption [April 2, 2002]), the private educational institution must be in a building architecturally compatible with other buildings in the surrounding neighborhood, and, if the private educational institution will be located on a lot, tract, or parcel of land of 2 acres or less, in either an undeveloped area or an area substantially developed with single-family homes, the exterior architecture of the building must be similar to a single-family home design, and at least comparable to any existing homes in the immediate neighborhood;

Conclusion: As noted in the Supplemental Staff Report, the nursery school building was purpose-built and does not look very much like a residence. The existing building, of course, need not comply with this section because it was built many years ago. Even with the proposed addition, however, the building would be comparable in scale to nearby structures, and smaller than many of the newer homes. The building is painted in bright, primary colors, which makes it unusual. However, with only one story, and the whole structure sitting several feet below grade, the building is not architecturally obtrusive. The Hearing Examiner concludes that the proposed addition satisfies this requirement sufficiently to permit approval of the modification.

- (3) the private educational institution will not, in and of itself or in combination with other existing uses, affect adversely or change the present character or future development of the surrounding residential community; and

Conclusion: The Kensington Nursery School has operated at this site since 1957 without adversely affecting or changing the character or future development of the surrounding residential community – in fact, the residential community on Decatur Avenue has grown substantially

larger during that time period – and there is no evidence to suggest that the proposed modification would have these effects. The modification would not result in increased enrollment or intensification of activity levels; the design and scale of the proposed addition would maintain the integrity of the existing building, and would not be a significant enough change to affect the residential character of the surrounding residential community; and the recommended conditions of approval would spread out the parking needs over a period of time and limit the number of large events on site, both of which would avoid parking spillover.

(4) the private educational institution must conform with the following standards in addition to the general development standards as specified in Section G-1.23:

- a. **Density**—The allowable number of pupils per acre permitted to occupy the premises at any one time must be specified by the Board considering the following factors:
  1. Traffic patterns, including:
    - a) Impact of increased traffic on residential streets;
    - b) Proximity to arterial roads and major highways;
    - c) Provision of measures for Transportation Demand Management as defined in Section 42A-21 of the Montgomery County Code;
    - d) Adequacy of drop-off and pick-up areas for all programs and events, including on-site stacking space and traffic control to effectively deter queues of waiting vehicles from spilling over onto adjacent streets; and
  2. Noise or type of physical activity;
  3. Character, percentage, and density of existing development and zoning in the community;
  4. Topography of the land to be used for the special exception; and
  5. Density greater than 87 pupils per acre may be permitted only if the Board finds that (i) the program of instruction, special characteristics of students, or other circumstances justify reduced space and facility requirements; (ii) the additional density will not adversely affect adjacent properties; (iii) additional traffic generated by the additional density will not adversely affect the surrounding streets.

Conclusion: The nursery school has agreed to a condition limiting the number of children on site at one time to 29. With nearly three-quarters of an acre of land on site, the school has a density of students per acre far below the specified limit of 87. This relatively low density is appropriate at this location, on a narrow street with only one point of access and limited parking. The evidence supports a conclusion that with the recommended condition requiring staggered class times, the traffic generated by the school would not have an adverse impact on local streets. Moreover, the noise and type of physical activity on site would not be affected by the proposed modification, and is not out of keeping with the moderate density of existing development.

- b. **Buffer**—All outdoor sports and recreation facilities must be located, landscaped or otherwise buffered so that the activities associated with the facilities will not constitute an intrusion into adjacent residential properties. The facility must be designed and sited to protect adjacent properties from noise, spill light, stray balls and other objectionable impacts by providing appropriate screening measures, such as sufficient setbacks, evergreen landscaping, solid fences and walls.

Conclusion: Petitioner does not propose any new outdoor facilities, but as explained in Part I of this report, the Board is authorized to consider the underlying special exception in this case, due to the size of the proposed addition. Photographic and other evidence indicates that the back yard is fully utilized, with an array of play equipment, and that existing landscaping, consisting of scattered trees and deciduous shrubs, does not provide an effective buffer for neighboring residences. The recommended conditions of approval include a requirement that Petitioner erect a solid wood, six-foot fence to replace the existing chain-link fence, except that the segment of chain link fence at the front of the site, with a gate in it, may remain if Petitioner prefers.

- (b) If a Private Educational Institution operates or allows its facilities by lease or other arrangement to be used for: (i) tutoring and college entrance exam preparatory courses, (ii) art education programs, (iii) artistic performances, (iv) indoor and outdoor recreation programs, or (v) summer day camps, the Board must find, in addition to the other required findings for the grant of a Private Education Institution special exception, that the activities in combination with other activities of the institution, will not have an adverse effect on the surrounding neighborhood due to traffic, noise, lighting, or parking, or the intensity, frequency, or duration of activities. In evaluating traffic impacts on the community, the Board must take into consideration the total cumulative number of expected car trips generated by the regular academic program and the after school or summer programs, whether or not the traffic exceeds the capacity of the road. A transportation management

plan that identifies measures for reducing demand for road capacity must be approved by the Board.

The Board may limit the number of participants and frequency of events authorized in this section.

Conclusion: Kensington Nursery School has reported no accessory programs, summer camps or leases to other parties.

(c) Programs Existing before April 22, 2002.

- (1) Where previously approved by the Board, a private educational institution may continue the operation of [accessory programs and summer camps]...

Conclusion: Not applicable.

- (2) Where not previously approved by the Board, such programs may continue until April 22, 2004. Before April 22, 2004, the underlying special exception must be modified to operate such programs, whether such programs include students or non-students of the school. The Board may establish a limit on the number of participants and frequency of events for authorized programs.

Conclusion: Not applicable.

(d) Site plan.

- (1) In addition to submitting such other information as may be required, an applicant shall submit with his application a site plan of proposed development. Such plan shall show the size and shape of the subject property, the location thereon of all buildings and structures, the area devoted to parking and recreation facilities, all access roads and drives, the topography and existing major vegetation features, the proposed grading, landscaping and screening plans and such other features necessary for the evaluation of the plan.
- (2) No special exception, building permit or certificate of occupancy shall be granted or issued except in accordance with a site plan of development approved by the board. In reviewing a proposed site plan of development the board may condition its approval thereof on such amendments to the plan as shall be determined necessary by the board to assure a compatible development which will have no adverse effect on the surrounding community, and which will meet all requirements of this chapter. Any departure from a site plan of development as finally approved by the board shall be cause for revocation of the special exception, building permit or certificate of occupancy, in the manner provided by law.

Conclusion: Petitioner has submitted several maps, but before approval of the modification takes effect, Petitioner must submit a document entitled "site plan," displaying all of the



features outlined in this section. This requirement is addressed in more detail in the recommended conditions of approval.

- (e) **Exemptions.** The requirements of Section G-2.19 do not apply to the use of any lot, lots or tract of land for any private educational institution, or parochial school, which is located in a building or on premises owned or leased by any church or religious organization, the government of the United States, the State of Maryland or any agency thereof, Montgomery County or any incorporated village or town within Montgomery County. . .

Conclusion: Not applicable.

- (f) **Nonconforming uses.** Nothing in this chapter shall prevent any existing private educational institution which obtained a special exception prior to the effective date of this chapter, from continuing its use to the full extent authorized under the resolution granting the respective special exception, subject, however, to division 59-G-4 of this chapter.

Conclusion: Not applicable.

**(g) Public Buildings.**

- (1) A special exception is not required for any private educational institution that is located in a building or on premises that have been used for a public school or that are owned or leased by Montgomery County.
- (2) However, site plan review under Division 59-D-3 is required for:
  - (i) construction of a private educational institution on vacant land owned or leased by Montgomery County; or
  - (ii) any cumulative increase that is greater than . . .

Conclusion: Not applicable.

- (h) **Applications filed before May 6, 2002.** Any application filed before May 6, 2002 for a private educational institution special exception or modification of a private educational institutional special exception must comply with the requirements of Article 59-G and Article 59-E in effect at the time the special exception was filed.

Conclusion: Not applicable.

### **C. General Standards**

The general standards for a special exception are found in Section 59-G-1.21(a). The Technical Staff reports and the Petitioner's written evidence and testimony provide sufficient evidence that the general standards would be satisfied in this case, as outlined below.

**Sec. 59-G-1.21. General conditions:**

- (a) A special exception may be granted when the Board, the Hearing Examiner, or the District Council, as the case may be, finds from a preponderance of the evidence of record that the proposed use:

- (1) Is a permissible special exception in the zone.

Conclusion: A private educational institution is a permitted use in the R-60 Zone.

- (2) Complies with the standards and requirements set forth for the use in Division 59-G-2. The fact that a proposed use complies with all specific standards and requirements to grant a special exception does not create a presumption that the use is compatible with nearby properties and, in itself, is not sufficient to require a special exception to be granted.

Conclusion: With the recommended conditions of approval, the proposed modification would comply with the standards and requirements set forth for the use in Code §59-G-2.19, as detailed in Part IV.B. above.

- (3) Will be consistent with the general plan for the physical development of the District, including any master plan adopted by the commission. Any decision to grant or deny special exception must be consistent with any recommendation in an approved and adopted master plan regarding the appropriateness of a special exception at a particular location. If the Planning Board or the Board's technical staff in its report on a special exception concludes that granting a particular special exception at a particular location would be inconsistent with the land use objectives of the applicable master plan, a decision to grant the special exception must include specific findings as to master plan consistency.

Conclusion: The evidence supports the conclusion that the proposed modification would be consistent with the *1990 Master Plan for the Communities of Kensington-Wheaton*, which recommends no changes in land use in the area of the subject site.

- (4) Will be in harmony with the general character of the neighborhood considering population density, design, scale and bulk of any proposed new structures, intensity and character of activity, traffic and parking conditions, and number of similar uses.

Conclusion: With the recommended conditions of approval, the proposed modification would be in harmony with the general character of the neighborhood considering the cited factors. Enrollment would not change, remaining well below the 87-students-per-acre density permitted in the Zoning Ordinance without special justification. The design, scale and bulk of the building, with the

proposed addition, would be consistent with the existing building and would be compatible with surrounding structures, which have grown up around the building. The modification would involve no change in the intensity and character of activities, which would remain at a level in keeping with the moderate-density character of the neighborhood. With the recommended conditions, class times would be staggered, reducing the concentration of vehicular trips and avoiding parking spillover. In addition, the recommended conditions would limit the number of large events permitted each year, to reduce the imposition on neighbors from extended periods of off-site parking.

No similar uses have been identified in the general neighborhood.

- (5) Will not be detrimental to the use, peaceful enjoyment, economic value or development of surrounding properties or the general neighborhood at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.

Conclusion: The evidence supports the conclusion that with the recommended conditions of approval, the proposed modification would not be detrimental to the use, peaceful enjoyment, economic value or development of surrounding properties or the general neighborhood at the subject site.

- (6) Will cause no objectionable noise, vibrations, fumes, odors, dust, illumination, glare, or physical activity at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.

Conclusion: The evidence supports the conclusion that with the recommended conditions, the proposed modification would cause no objectionable noise, vibrations, fumes, odors, dust, illumination, glare, or physical activity at the subject site.

- (7) Will not, when evaluated in conjunction with existing and approved special exceptions in any neighboring one-family residential area, increase the number, intensity, or scope of special exception uses sufficiently to affect the area adversely or alter the predominantly residential nature of the area. Special exception uses that are consistent with the recommendations of a master or sector plan do not alter the nature of an area.

Conclusion: The proposed modification would not increase the number of special exception uses in the area. The evidence supports the conclusion that the proposed modification

would not increase the intensity or scope of special exception uses sufficiently to affect the area adversely or alter its predominantly residential nature.

- (8) Will not adversely affect the health, safety, security, morals or general welfare of residents, visitors or workers in the area at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.

Conclusion: The evidence supports the conclusion that with the recommended conditions, the proposed modification would not adversely affect the health, safety, security, morals or general welfare of residents, visitors or workers in the area at the subject site.

- (9) Will be served by adequate public services and facilities including schools, police and fire protection, water, sanitary sewer, public roads, storm drainage and other public facilities.

Conclusion: The evidence supports the conclusion that the subject property would continue to be served by adequate public facilities with the proposed modification.

- (i) If the special exception use requires approval of a preliminary plan of subdivision, the adequacy of public facilities must be determined by the Planning Board at the time of subdivision review. In that case, subdivision approval must be included as a condition of granting the special exception. If the special exception does not require approval of a preliminary plan of subdivision, the adequacy of public facilities must be determined by the Board of Appeals when the special exception is considered. The adequacy of public facilities review must include the Local Area Transportation Review and the Policy Area Transportation Review, as required in the applicable Annual Growth Policy.

Conclusion: Subdivision approval would be required as a condition of approval, as recommended by Technical Staff. Subdivision is necessary because a building permit cannot be issued for a building that straddles the line between two recorded lots.

- (2) With regard to findings relating to public roads, the Board . . . must further determine that the proposal will have no detrimental effect on the safety of vehicular or pedestrian traffic.

Conclusion: The evidence supports a conclusion that the proposed modification, with the recommended conditions of approval, would have no detrimental effect on the safety of vehicular or pedestrian traffic. Moreover, the requirement for staggered class times should lead to an improvement in traffic safety.

- (b) Nothing in this Article relieves an applicant from complying with all requirements to obtain a building permit or any other approval required by law. The Board's finding of any facts regarding public facilities does not bind any other agency or department which approves or licenses the project.

Conclusion: No finding necessary.

- (c) The applicant for a special exception has the burden of proof to show that the proposed use satisfies all applicable general and specific standards under this Article. This burden includes the burden of going forward with the evidence, and the burden of persuasion on all questions of fact.

Conclusion: The record substantiates a finding that the Petitioner has met the burden of proof and persuasion.

### **59-G-1.23 General Development Standards**

Pursuant to Section 59-G-1.23, each special exception must comply with the development standards of the applicable zone where the special exception is located, applicable parking requirements under Article 59-E, forest conservation requirements under Chapter 22A, and sign regulations under Article 59-F; must incorporate glare and spill light control devices to minimize glare and light trespass; and may not have lighting levels along the side and rear lot lines exceeding 0.1 foot candles. Furthermore, under Section 59-G-1.23(g), any structure constructed under a special exception in a residential zone “must be well related to the surrounding area in its siting, landscaping, scale, bulk, height, materials, and textures, and must have a residential appearance where appropriate. Large building elevations must be divided into distinct planes by wall offsets or architectural articulation to achieve compatible scale and massing.” Under Section 59-G-1.26, a structure constructed pursuant to a special exception in a residential zone must, whenever practicable, have the exterior appearance of a residential building of the type otherwise permitted, and must have suitable landscaping, streetscaping, pedestrian circulation and screening.

As described in the Staff Report on pages 2-3, the school building, with the addition, would satisfy the development standards of the R-60 Zone. The only applicable parking requirement is under Section 59-G-2.19, which is discussed at length earlier in this report; as noted in Part I, the Hearing Examiner does not find it appropriate, under Section 59-G-1.3(c)(4), to require this Petitioner to

fully comply with the general landscaping and screening requirements, including for the parking area. The project is exempt from forest conservation requirements due to its size. No new signage is proposed. Petitioner proposes one new light fixture, which would be shielded to avoid glare and light trespass. As discussed in more detail in Part IV.B. above, with the proposed addition, the nursery school building would be in keeping with the scale and bulk of surrounding buildings, and would be compatible with the general neighborhood.

## V. RECOMMENDATIONS

Accordingly, based on the foregoing findings and conclusions and a thorough review of the entire record, I recommend that Petition No. CBA-470-A, which seeks to modify an existing special exception for a private educational institution, Kensington Nursery School, located at 3202 Decatur Avenue in Kensington, to permit a building addition that would house a multi-purpose room, an administrative area, additional storage space and a handicapped-accessible restroom, be **granted** with the following conditions:

1. The Petitioner shall be bound by all of its testimony and exhibits of record, including the Site Plan to be submitted pursuant to Condition 3 below, and by the testimony of its witnesses and representations of counsel identified in this report.
2. All terms and conditions of the approved special exception shall remain in full force and effect, except as specifically amended by this modification.
3. Before this modification may take effect, Petitioner must file with the Board of Appeals a document entitled "Site Plan," which shall show the size and shape of the subject property, the location thereon of all existing and proposed buildings and structures, the area devoted to parking (on and off school property) and recreation facilities, the entrance drive, the topography and existing major vegetation features, existing and proposed exterior lighting, any grading proposed in connection with the proposed addition, the proposed stormwater management facilities and any additional landscaping Petitioner proposes. The Site Plan shall show the

replacement of all existing chain link fencing with six-foot, solid wood fencing, except that Petitioner may choose to retain chain link fencing to separate the front and rear yards by identifying that portion of the fence as "chain link fence to remain."

4. Petitioner must obtain approval from the Montgomery County Planning Board for a new plan of subdivision before issuance of any building permit or sediment control permit, as applicable.
5. Petitioner shall request detailed review of stormwater management issues in connection with subdivision review.
6. Petitioner shall be bound to implement either the Stormwater Management Concept Plan submitted as Exhibit 41(c) in this record, or such other stormwater management plan as may be approved by appropriate governmental authorities during subdivision review. Copies of any stormwater management plan approved during subdivision review shall be submitted to the Board of Appeals and the Department of Permitting Services for their records.
7. Class times shall be staggered, so that no class begins or ends within 30 minutes of the beginning or end of another class.
8. Petitioner shall hold no more than four events per year (including the two mandatory all-parent meetings) with an attendance resulting in a need for more parking than can be accommodated by the gravel parking area in front of the school and the paved area on the west side of the school building.
9. No enrollment increase shall be sought under this special exception during the five-year period immediately following approval of this modification.
10. In the event that the 15-inch-diameter tree shown slightly southeast of the existing building on Exhibit 22 dies as a result of construction activities connected with this modification, Petitioner shall replace it with a tree of a similar species, in the closest viable location to the current location, in the next growing season.

11. Petitioner must obtain and satisfy the requirements of all licenses and permits, including but not limited to building permits, necessary to implement the special exception as granted herein. Petitioners shall at all times ensure that the special exception use and facility comply with all applicable codes (including but not limited to building, life safety and handicapped accessibility requirements), regulations, directives and other governmental requirements.

If the Board wishes to direct the Petitioner to submit the required Site Plan to the Hearing Examiner for review, I will be glad to review it and provide a brief supplemental report.

Dated: May 18, 2006

Respectfully submitted,

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Françoise M. Carrier  
Hearing Examiner